



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

GENERAL COUNSEL

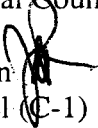
400 Seventh St., S.W.
Washington, D.C. 20590

June 15, 2004

INFORMATION MEMORANDUM

Subject: Longer term implications of the *Department of Transportation v. Public Citizen* Supreme Court decision

To: Deputy Secretary
Under Secretary of Transportation for Policy
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On June 7, 2004, in *Department of Transportation v. Public Citizen*, No. 03-358, the Supreme Court unanimously upheld the Federal Motor Carrier Safety Administration's (FMCSA) issuance of its safety regulations dealing with the admission of Mexican trucks and buses to the United States, thus removing the judicial barriers to their operation in the United States. Moreover, it is not the narrow, procedural decision that some of the losing parties have made it out to be in media reports. In fact, the decision has broad environmental law implications and should be a particularly useful precedent in four important areas:

1. It places an affirmative duty on prospective plaintiffs to raise any issues they may wish to challenge in court during an agency's environmental review process. This will assist the agency in dealing with any potential claims and correcting possible deficiencies. It also provides a powerful defense against plaintiffs raising new issues in court that the agency arguably failed to anticipate during the environmental review process.
2. The Court places clear boundaries on the scope of an agency's environmental analysis when an agency's decision is limited only to a portion of a larger matter, most of which is beyond the agency's discretion or ability to alter or effectuate.

3. The Court both clarifies and places helpful limits on the requirement to consider cumulative and secondary impacts in the environmental analysis of an agency's action.
4. The Court's opinion more clearly defines when an agency need not make general conformity determinations for emissions beyond the agency's legal control.

Background

On June 7, 2004, the United States Supreme Court unanimously vindicated the environmental analysis undertaken by the FMCSA in support of the safety rules it issued for Mexican trucks and buses entering the United States. These rules were proposed in May 2001, shortly after the President announced his intention to permit cross-border operations of Mexican trucks and buses beyond the commercial zones along the U.S.-Mexico border. When issued in their final form in March 2002, the rules implemented additional requirements imposed by §350 of the FY 2002 DOT Appropriations Act. In November 2002, the President issued an order permitting Mexican truck and bus operations beyond the border commercial zones. The President acted pursuant to his express statutory power to admit Mexican trucks and buses under the ICC Termination Act of 1995 (49 U.S.C. §13902(c)) and in fulfillment of U.S. obligations under the 1992 North American Free Trade Agreement (NAFTA), as construed by a decision of an international arbitration panel that the previous exclusion of Mexican trucks violated NAFTA.

In issuing its safety regulations, FMCSA confined its environmental analysis, primarily under the National Environmental Policy Act (NEPA) and the general conformity provisions of the Clean Air Act (CAA), to the environmental effects of those regulations. Because the President had announced his intent to permit Mexican trucks and buses to operate throughout the United States, FMCSA concluded that it had no power to avoid or alter that result, but only to issue the safety rules that implemented the President's decision. These safety rules by themselves had few environmental impacts. FMCSA prepared a lower tier NEPA document called an Environmental Assessment (EA), followed by a Finding of No Significant Impact (FONSI). Similarly, since the rules alone did not have significant air quality impacts, even assuming that Mexican trucks and buses were "dirtier" than U.S. trucks and buses, they were not subject to the general conformity provisions of the CAA. There is no dispute that the President's action was not subject to NEPA and the CAA, nor were his actions reviewable under the Administrative Procedure Act (which governs judicial review of NEPA claims).

Opponents to the admission of Mexican trucks and buses, including Public Citizen, several unions, and a number of environmental groups, filed suit in the Court of Appeals for the Ninth Circuit, challenging the adequacy of the record in support of FMCSA's regulations. They argued that FMCSA had violated NEPA and the CAA because it failed to consider the entire environmental impact of admitting Mexican trucks and buses. They asserted that since Congress had imposed §350 as a precondition to FMCSA's implementation of a Presidential decision to admit Mexican trucks and buses, FMCSA had to analyze that impact since "*but for*" FMCSA's regulations, Mexican trucks and buses could not be admitted into the United States. Similarly, they argued that since a large number of such vehicles might result in violations of the air quality implementation

plans of a number of nonattainment areas, FMCSA was required to follow the general conformity procedures of the CAA.

It was generally assumed that admitting Mexican trucks and buses could have significant environmental impacts. However, FMCSA took the position that because of its very limited authority, it did not need to prepare a full-scale environmental impact statement (EIS) nor make a general conformity finding.

The Ninth Circuit, relying on an existing line of cases about the scope of analysis required of a Federal agency when it is vested with sufficient discretion to affect the outcome of an action, agreed with the opponents, and set aside the FMCSA regulations pending the issuance of an EIS and compliance with the general conformity provisions of the CAA. The Supreme Court granted the Government's petition for a Writ of Certiorari in December 2003. On June 7, the Court, in a unanimous decision, reversed the Court of Appeals opinion, completely supporting the actions taken by the FMCSA.

The Supreme Court's Decision

The decision of the Supreme Court is both quite brief and very clear. Despite its relative brevity, because of the way in which it was decided, the decision has major implications that go well beyond the issue of admitting Mexican trucks and buses. In reaching its conclusion, the Court relied heavily on the arguments made on behalf of the government.

The Court bypassed the opportunity to base its decision on interference with the foreign policy power of the President. Courts have long been very careful about interfering with this basic prerogative of the President. Nevertheless, the Ninth Circuit decision had, in effect, frustrated a Presidential decision by imposing such a broad environmental responsibility on FMCSA. FMCSA could not comply with the Ninth Circuit decision without essentially reexamining the environmental consequences of the President's action, doing indirectly what it had no power to do directly. A decision to reverse the Ninth Circuit on this basis would have had little practical benefit beyond this specific case, because NEPA issues so rarely arise in the foreign policy context and the law in this area is so well established.

Instead, the Court chose to base its decision on four basic points, each of which will provide important benefits.

Key benefits of the Decision:

1. The duty to comment.

The Court barred the respondents from raising issues that they failed to raise initially to the agency. In particular, the Court noted that the respondents had failed to raise any objections to the rulemaking alternatives identified in the EA. Thus "[r]espondents have ... forfeited any objection to the EA on the ground that it failed adequately to discuss potential alternatives to the proposed action." Similarly, respondents failed to provide meaningful comments about actions that FMCSA could take to reduce or mitigate the environmental impacts of its action.

This holding enhances the burden on those seeking to challenge NEPA documents in court. It means that in order to effectively maintain litigation options, a potential plaintiff must at least provide some comments raising his concerns during the environmental review process. It is telling that the Supreme Court would so clearly apply this even to the alternatives analysis, since that has been characterized as the "heart" of an EIS. Over the years, courts have often allowed litigants to raise new theories and factors for the first time in litigation on the theory that the agency preparing the NEPA document is responsible for its adequacy. The Supreme Court acknowledges this duty, noting that a flaw in the EA or EIS might be so obvious that it would not be necessary for a commentator to point it out first in order to preserve its ability to challenge its proposed action. However, in this case, the Court was clearly satisfied with the limited look that FMCSA took in its EA at what it considered to be reasonable alternatives and possible mitigation strategies.

While a number of cases have taken similar positions, this very clear ruling by the Court will greatly strengthen the value of this defense. Moreover, it requires project opponents to raise their concerns to the agency during the NEPA process. Thus, the agency can better address those concerns as it is preparing its final documentation. This reduces the risk to the agency of being "blind-sided" by new issues first raised in litigation.

2. The scope of analysis.

The Court accepted the position that the environmental analysis could be limited by the scope of FMCSA's discretion. The Court agreed that the President's decision to admit Mexican trucks and buses could be taken as a given, and thus the Court did not require the FMCSA to view this as a separate "*but for*" consequence of *its* action. The Court so concluded in spite of the fact that the President's action had not been effectuated and could not, in fact, be effectuated until the FMCSA acted.

This has several important consequences. The decision would seem to resolve the question as to what duty an agency has to examine environmental consequences when the range of its discretion is small. Even though FMCSA's action was coextensive with the President's determination geographically, its discretion was not. The focus of the environmental analysis has to be to inform the agency's decision-making. The Court's decision probably terminates the line of cases followed by the Ninth Circuit, which held that if an agency has any discretion over an action, it must examine all of the environmental consequences of that action, irrespective of the scope of its discretion. This could be a very useful precedent for agencies that are taking relatively minor actions, or actions that, while broad in geographic scope, are only a minor portion of an undertaking over which they have no real control.¹ For example, large-scale transportation projects are often a very complicated mix of Federal, State, and local actions. Sorting out the scope of the Federal environmental review is difficult and can result in delays and imposing

¹ Most courts have long accepted that where the Federal action subject to NEPA is a small element of the total undertaking, even where the total action could not be implemented without the Federal action, an agency need not review the entire undertaking because the Federal "hook" is too small. A typical example of such an action would be a discharge permit for the outflow pipe of a very large industrial development, where the agency's analysis could effectively be limited to the environmental consequences of issuing its permit without having to take the entire industrial development into account.

onerous analytical requirements even on portions of the project that are only marginally related to the Federally funded (or Federally approved) portions. This decision should be of considerable help in dealing with these kinds of situations. One caveat on the impact of this part of the decision is that it is relatively rare for an agency to so clearly have no discretion, as here, where the FMCSA was confronted with a Presidential directive. Also, it is unusual for one actor in the matter to be absolved entirely from having to comply with NEPA (and the CAA).

3. Cumulative and secondary impacts.

The Court added much clarity to the required scope of cumulative and secondary impact analyses. An agency must consider how its action interacts with other actions and activities that are going on or have gone on in the affected area. This is the cumulative impact analysis. Secondary or indirect impacts are those that flow from the agency's action, even though not directly caused by the action the agency is considering. In spite of the relatively clear language of the regulations of the Council on Environmental Quality cited by the Court, case law in these areas is confusing and contradictory.

The Supreme Court very clearly states that FMCSA is only responsible for describing and analyzing its cumulative addition, and if that addition is small, it need not do so in an EIS. This is particularly interesting because the Court so clearly isolated FMCSA's action from the President's decision. Moreover, it repeated this analysis for secondary impacts, again agreeing that FMCSA does not have to consider admission of trucks and buses as an indirect impact of its action because that action was wholly beyond its discretion and not really related directly to the safety issues that FMCSA was charged with considering. DOT frequently is confronted with situations where it is asked to speculate about the developmental impacts of its projects, even to the point of having to consider changes in land use that are contrary to existing local land use plans and zoning controls. This case could help us to better define and place reasonable limits on this kind of analysis.

4. General conformity under the CAA.

The Supreme Court used the same principles it applied in the NEPA part of its decision in considering the applicability of the general conformity requirements of the CAA. The Court dismissed the argument that FMCSA's safety regulations resulted in emissions within the meaning of the CAA. Specifically, a conformity determination must be made when an agency's action directly or indirectly results in the emission of controlled pollutants. FMCSA safety rules themselves were not a source of emissions, and, since the admission of Mexican trucks and buses was beyond FMCSA's power to prevent, they were not an indirect cause of emissions either, even if Mexican trucks and buses were a source of increased emissions.

NEPA cases in the Supreme Court are relatively rare, and thus, when they do occur, they tend to be carefully reviewed and frequently cited. It is also unusual for a case of this sort to be decided unanimously. Thus, this case will probably have significant impacts on NEPA litigation for some time to come.